

# McNamara Declaration

## Exhibit 7

1 UNITED STATES DISTRICT COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 - - - - - x

4 HACHETTE BOOK GROUP, :

5 INC., HARPERCOLLINS :

6 PUBLISHERS LLC, JOHN : Case No.

7 WILEY & SONS, INC., : 1:20-cv-04160-JGK-OTW

8 and PENGUIN RANDOM :

9 HOUSE LLC, :

10 Plaintiffs, :

11 v. :

12 INTERNET ARCHIVE and :

13 DOES 1 through 5, :

14 inclusive, :

15 Defendants. :

16 - - - - - x

17  
18 REMOTE ZOOM VIDEO 30(b)(6)

19 DEPOSITION PURSUANT TO NOTICE

20 CHRIS FREELAND

21 December 17, 2021

22 9:35 CST

23  
24 Job No.: 4993446

25 Reported By: Cynthia J. Conforti

1 book outright -- I'm just trying to understand.  
2 What do you mean by "purchase the book outright"?  
3 How do you define that?

4 A A receipt, not a license.

5 Q So you -- you would only purchase a book,  
6 an eBook, if it was received with no conditions  
7 placed on the use of that book; is that right?

8 MR. GRATZ: Objection to form.

9 THE WITNESS: We would purchase books, not  
10 license books.

11 BY MS. McNAMARA:

12 Q Okay. And by purchasing books, you  
13 understand that to be a purchase without any  
14 conditions on how those books could be used?

15 MR. GRATZ: Objection to form.

16 THE WITNESS: Yes.

17 BY MS. McNAMARA:

18 Q Thank you.

19 Now, you've made reference to the overlap  
20 analysis. Can you tell me what that means?

21 A When a library is interested in becoming a  
22 partner with Open Libraries, we run an overlap  
23 analysis that compares their physical holdings  
24 with our digital holdings.

25 Q And what results from that comparison?

1           Q   And do you know whether the libraries  
2           actually book-by-book verify that their physical  
3           holdings contain the works that are identified as  
4           matches?

5           A   Can you -- can you ask the question again?

6           Q   Yes, of course. And please do that if for  
7           some reason you don't understand the question.  
8           I -- really, I want you to ask, so please do. So  
9           thank you.

10          So if I can restate it:

11          Do you -- when you say that libraries  
12          verify the match records that you provide to them,  
13          do you have an understanding as to what, if  
14          anything, the library does to verify the accuracy  
15          of those records?

16          A   We depend on our partners for verifying  
17          the data.

18          Q   So you don't place any requirements on  
19          them to -- to physically check that each of the  
20          books are -- exist in their -- in their system?

21          A   No.

22          Q   Has Internet Archive ever run an audit to  
23          review the physical copies at libraries to verify  
24          that the matches are accurate?

25          A   At our partner libraries?

1 A Correct.

2 Q So you're -- in effect you're relying on  
3 the library to be -- that their records are  
4 accurate, aren't you?

5 A Yes.

6 Q When the Internet Archive determines using  
7 the overlap analysis that a partner library  
8 possesses a copy of a book of which IA already  
9 possess as a scanned copy, does the  
10 Internet Archive make a new scan of that book?

11 A No.

12 Q So instead it just increases by one the  
13 number of concurrent checkouts of that book that  
14 would be allowed; is that right?

15 MR. GRATZ: Objection to form.

16 THE WITNESS: If the library agrees to put  
17 its copy into controlled digital lending, then  
18 yes, we increment by one.

19 BY MS. McNAMARA:

20 Q And has Internet Archive set any upper  
21 limit to the number of copies available for  
22 concurrent lending via the Open Libraries or  
23 archive.org?

24 MR. GRATZ: Objection to form.

25 THE WITNESS: No.

1 BY MS. McNAMARA:

2 Q So if I'm understanding, under controlled  
3 digital lending, if a hundred partner libraries  
4 possessed a copy of the same book, the  
5 Internet Archive would be able to lend a hundred  
6 copies of that book simultaneously; is that right?

7 A If all of the libraries put one copy into  
8 controlled digital lending, then in that example,  
9 there would be a hundred copies.

10 Q And you could -- it would be the same  
11 answer if there were a thousand libraries that had  
12 the same book and put them into controlled digital  
13 lending; is that right?

14 A If all of the partners put their copies  
15 in, yes.

16 Q Is there anything in the partner library  
17 agreement that would limit how many concurrent  
18 copies could be -- could be lent?

19 MR. GRATZ: Objection to form.

20 THE WITNESS: There is nothing in the  
21 partner agreement to that effect.

22 BY MS. McNAMARA:

23 Q And as you understand the concept of  
24 controlled digital lending, does it place any  
25 upper limit on the number of concurrent copies

1       that could be lent at one time?

2           A   Not to my knowledge.

3           MR. GRATZ:   I -- sorry.   I had an  
4       objection to form to the prior -- to the prior  
5       question.

6           MS. McNAMARA:   Sure.

7       BY MS. McNAMARA:

8           Q   Do you have an understanding as to what  
9       the goal or purposes are for implementing the  
10      overlap analysis?

11          A   The purpose of the overlap is to let our  
12      partners know what of our digital collection is  
13      available that matches their print collection.

14          Q   And via the overlap analysis and the  
15      participation of partner libraries in Open  
16      Library, does this increase the number of people  
17      who can view a title -- a given title at one time?

18          A   If the library opts to move their  
19      collection into -- the matched records into  
20      controlled digital lending, then it would give us  
21      an additional copy to lend.

22          Q   And Internet Archive is -- those copies  
23      are available to lend without Internet Archive  
24      having to incur the cost associated with scanning?

25          A   Correct.

1           Q   Is the overlap analysis conducted by  
2   Internet Archive, is it specific to works that are  
3   in copyright?

4           A   Yes.

5           Q   As a result of the Internet Archive  
6   implementing the overlap analysis have wait lists  
7   been reduced on Open Library?

8           A   Yes, for certain titles.

9           Q   And presumably, the more books  
10   Internet Archive has been able to obtain and scan,  
11   the greater likelihood there would be matches in  
12   the overlap analysis with potential partner  
13   libraries; isn't that right?

14          A   Yes.

15          Q   And so does the overlap analysis to some  
16   degree work in tandem with the book pipeline that  
17   is operated by BetterWorldBooks?

18           MR. GRATZ:  Objection to form.

19           THE WITNESS:  No, they're independent  
20   processes.

21   BY MS. McNAMARA:

22          Q   But, in fact, there is a book pipeline  
23   that the BetterWorldBooks provides more and more  
24   books to Internet Archive for scanning; isn't that  
25   right?



1           Q   Were you at the 2020 Library Leaders  
2   Forum?

3           A   Yes.

4           Q   I've seen quoted from materials there that  
5   Brewster Kahle had indicated that 81 libraries had  
6   signed on to Open Library and that 2.8 million  
7   copies have been added to Open Library through  
8   your participation. Do those numbers sound  
9   correct to you?

10          A   Yes.

11          Q   And do you know whether those numbers have  
12   changed since that presentation in 2020?

13               MR. GRATZ:  Objection to form.

14               THE WITNESS:  Have the numbers changed  
15   since 2020?  Yes.

16   BY MS. McNAMARA:

17          Q   Have they increased?

18          A   Yes.

19          Q   Do you know approximately how many copies  
20   of books have been added -- if not 2.8 million,  
21   what the number of copies of books that have been  
22   added to the Open Libraries project?

23          A   I don't know what our current number is.

24          Q   But it's in excess of 2.8 million?

25          A   I believe so, yes.

1 priority, if it does?

2 A I'm not clear on the question.

3 Q What, if anything, does the  
4 Internet Archive do to make sure that the books  
5 they add to the Open Libraries projects are not  
6 yet available in digital form?

7 MR. GRATZ: Objection, misstates the  
8 content of the document. Objection to form.

9 THE WITNESS: We don't.

10 BY MS. McNAMARA:

11 Q So it's correct that Internet Archive does  
12 not only add books that are not available in  
13 digital form; isn't that right?

14 A I'm unclear with the phrasing.

15 Q Yes, I was double negative, so it's not  
16 surprising you were unclear with it.

17 Does Internet Archive limit books -- when  
18 they're adding books to the Open Libraries  
19 project, do they only add books that are not  
20 available in digital form?

21 A No.

22 Q So they add books that are in fact  
23 available for purchase commercially or to license  
24 to libraries; isn't that right?

25 A Yes.

1 that?

2 MR. GRATZ: Object -- I'm sorry.

3 Objection, vague in its use of the term "users of  
4 a particular library" and "their library."

5 THE WITNESS: Can you restate the  
6 question?

7 BY MS. McNAMARA:

8 Q Yes. Let me try to be very specific.

9 So, if, for example, the Internet Archive  
10 possessed one copy of Catcher in the Rye that it  
11 scanned and made available via the lending library  
12 and then a partner library possessed two copies of  
13 Catcher in the Rye that were added to the lending  
14 library through the overlap analysis, there would  
15 now be three copies of Catcher in the Rye  
16 available to be borrowed by Internet Archive users  
17 concurrently; is that right?

18 A We would only add one copy from a partner  
19 library --

20 Q Okay.

21 A -- for example.

22 Q Okay. So thank you. So let's refine the  
23 exam- -- the example.

24 If the Internet Archive possessed one copy  
25 of Catcher in the Rye and then the partner -- a

1 partner library had one copy, one copy was added  
2 from its system, and then another partner library  
3 added a third copy to the Open Library system,  
4 there would be available for concurrent borrowing  
5 from Internet Archive users of three copies; is  
6 that right?

7 A Correct.

8 Q And so if the first library in this  
9 example only physically owned one copy, patrons of  
10 that library could nonetheless go to the  
11 Internet Archive -- two or more patrons of that  
12 library could go to Internet Archive and check out  
13 the book; is that right?

14 A If there were available copies, yes.

15 Q And this would be true even though the  
16 partner library in the example only physically  
17 owned one copy; is that right?

18 A Yes.

19 Q How does that comport with the basic  
20 principle of owned-to-loan under the controlled  
21 digital lending?

22 MR. GRATZ: Objection to form.

23 You can answer.

24 THE WITNESS: In your -- in your example  
25 there were three copies, so one from the

1 Internet Archive and two from partner libraries,  
2 so there would be three physical copies and  
3 three -- the possibility of three digital  
4 concurrent loans.

5 BY MS. McNAMARA:

6 Q Right. But the partner library only  
7 physically owns one copy, yet their patrons are  
8 able to check out more than one -- well, more than  
9 one copy of that book at a time; is that correct?

10 MR. GRATZ: Objection to form.

11 THE WITNESS: There are three copies,  
12 three digital copies that could be on a concurrent  
13 loan.

14 BY MS. McNAMARA:

15 Q Okay. Thank you.

16 Now, in that same sentence I had read to  
17 you that began with "leveraging" --

18 A Yes.

19 Q -- it indicates that Internet Archive  
20 seeks to honor or honoring the rights of creators  
21 using digital rights management software.

22 Do you see that?

23 A Yes.

24 Q Does the Internet Archive honor the rights  
25 of creators in any other way other than putting on

1 expect that some portion of those license fees are  
2 paid to authors?

3 MR. GRATZ: Same objection.

4 THE WITNESS: I'm not clear on  
5 compensation structures.

6 BY MS. McNAMARA:

7 Q And you're not clear on compensation  
8 structures because Internet Archive does not pay  
9 license fees in order to obtain digital copies of  
10 books; isn't that right?

11 MR. GRATZ: Objection to the question  
12 asked as compound and to form.

13 You can answer.

14 THE WITNESS: We don't license materials.  
15 We purchase books outright when provided.

16 BY MS. McNAMARA:

17 Q So Internet Archive does not pay license  
18 fees to obtain digital copies of books, correct?

19 MR. GRATZ: Objection to form.

20 THE WITNESS: Correct.

21 BY MS. McNAMARA:

22 Q Are you aware that authors are paid  
23 royalties when commercial sales of their books are  
24 made via Amazon or some other outlet?

25 MR. GRATZ: Objection to form.

1 question.

2 BY MS. McNAMARA:

3 Q Well, when the Internet Archive acquires  
4 books that are then made available to users on the  
5 Open Libraries forum, the user can read that book,  
6 can download it, can open it on the platform, but  
7 they are -- the book is disseminated to the reader  
8 is my question.

9 MR. GRATZ: Objection, compound, vague.

10 THE WITNESS: Yes, we make books available  
11 for lending on archive.org.

12 BY MS. McNAMARA:

13 Q And does Internet Archive pay royalties in  
14 connection with the digitization of their work?

15 A No.

16 Q Does the Internet Archive pay authors  
17 royalties for making their books available for  
18 free on their website?

19 MR. GRATZ: Objection to form.

20 THE WITNESS: No.

21 BY MS. McNAMARA:

22 Q Wouldn't it honor the rights of creators  
23 more to pay them for making their eBook versions  
24 available?

25 MR. GRATZ: Objection to form.

1 BY MS. McNAMARA:

2 Q Do you see where it indicates that the  
3 library shares its catalog of books with the  
4 number of copies of each book with the  
5 Internet Archive?

6 And then the Internet Archive allows one  
7 additional user to check out the digital version  
8 of any book that overlaps with what  
9 Internet Archive has already digitized. Right?

10 MR. GRATZ: Objection to form.

11 THE WITNESS: Yes.

12 BY MS. McNAMARA:

13 Q The first sentence is:

14 The library will share their catalog of  
15 books with the number of copies of each book with  
16 Internet Archive.

17 A Yes.

18 Q And then it says: This will be updated  
19 quarterly.

20 Do you see that?

21 A Yes.

22 Q Does Internet Archive actually engage in  
23 quarterly updates of all its library partners?

24 A We are doing monthly updates now.

25 Q From the time this was originally



1 implemented in -- well, I think we've established  
2 this was started around 2017, the overlap  
3 analysis?

4 A Yes.

5 Q In the first years that the  
6 Internet Archive engaged in this overlap analysis  
7 and this project, did they do quarterly updates?

8 A I'm not sure of the frequency of the  
9 updates in the early years of the program.

10 Q Did they -- I'm -- did they require  
11 updates at a specific time frame? And by "they" I  
12 mean, Internet Archive.

13 A No.

14 Q And sometimes Internet Archive did annual  
15 updates; isn't that right?

16 A Yes.

17 Q And it -- that would depend upon the  
18 library's preference; isn't that correct?

19 A Yes.

20 Q Were there any libraries that no updates  
21 were ever done once they signed on for the  
22 program?

23 A No.

24 Q So there was some update done over some  
25 period of time dependent upon the library's

1 preference for each of the partners?

2 A Yes.

3 Q When Internet Archive receives an updated  
4 catalog from a library partner, what does it do?

5 A We reprocess their overlap.

6 Q And do you -- if there -- if certain books  
7 have been weeded out or no longer owned by the  
8 library, do you reduce the number of concurrent  
9 loans available by one?

10 A Yes.

11 Q And are there employees who are  
12 responsible for that?

13 A Employees where?

14 Q At the Internet Archive.

15 A I'm not clear on the question.

16 Q Is there a particular person or somebody  
17 who is responsible for reviewing the updated  
18 catalog and ensuring that the concurrent user  
19 number is correct?

20 A Again, we rely on our libraries for that.

21 Q So what about, let's say in years -- the  
22 first two or three years -- well, strike that.  
23 Let me ask you a question.

24 When did Internet Archive move to monthly  
25 updates with their partner libraries?

1           A    I believe that was last fall.

2           Q    So the fall of 2020 -- 2021?  I'm sorry.

3           A    Fall of 2020.

4           Q    Fall of 2020, okay.

5                    So prior to the fall of 2020, when  
6   Internet Archive was conducting updates either  
7   quarterly or annually based upon a library's  
8   preference, what about the period between the  
9   original overlap analysis and the update?  What --  
10   would Internet Archive have any way to know if the  
11   library had discarded a book?

12          A    During that time?

13          Q    Yes.

14          A    No.

15          Q    So it could be possible that  
16   Internet Archive included a book in its concurrent  
17   user numbers based upon the supposition or  
18   understanding that a library actually physically  
19   owned a book, but in fact that library could have  
20   weeded it out, that same book, the week after you  
21   had done the original overlap analysis; isn't that  
22   right?

23                MR. GRATZ:  Objection, incomplete  
24   hypothetical, form.

25                You can answer.

1 THE WITNESS: It's unlikely. We've asked  
2 our partners if they did major weeding projects to  
3 send us updated holdings.

4 BY MS. McNAMARA:

5 Q And that was something that you asked them  
6 back in 2017?

7 A Yes.

8 Q And did -- has any library, to your  
9 knowledge, provided the Internet Archive with an  
10 update concerning weeding projects by them  
11 voluntarily, not through the auditing process or  
12 updating process?

13 A I'm not sure.

14 Q In the time that you've been the director  
15 of Open Libraries, have you received an update  
16 analysis from a library that was not the result of  
17 the quarterly or annual update?

18 MR. GRATZ: Objection, misstates the  
19 witness's previous testimony, vague.

20 THE WITNESS: I'm not clear on the  
21 question.

22 BY MS. McNAMARA:

23 Q What I'm trying to understand is,  
24 Internet Archive, you know, until last fall,  
25 conducted either quarterly or annual updates of

1           A    I don't have a count, no.

2           Q    Do you have a sense whether it's  
3   10 percent of the 81 or some other percentage?

4           A    No, I don't.

5           Q    Do you know whether that's an unusual  
6   parameter?

7           A    I don't know.

8           Q    Wouldn't that be something you should know  
9   or be aware of given the importance of the  
10   one-to-one ratio in controlled digital lending,  
11   that you would want to know whether libraries have  
12   the books on offsite storage or whether they're  
13   still on the shelves in the library?

14           MR. GRATZ:  Objection to form.

15           THE WITNESS:  We don't know where  
16   libraries store their books.

17   BY MS. McNAMARA:

18           Q    And you don't do anything to require them  
19   to store them in one way or another, do you?

20           A    No, that's a local library decision.

21           Q    And that is the policy of Internet Archive  
22   that what -- how libraries comply with the  
23   requirements of controlled digital lending is a  
24   local library decision; isn't that right?

25           A    Yes.

1 multiple users at a time; isn't that right?

2 A Correct, within the owned-to-loan ratio.

3 Q Looking again at Exhibit 274, it indicates  
4 that:

5 The Internet Archive will offer online  
6 access to statistics as to how many books were  
7 borrowed each month in their state or country.

8 Do you see that?

9 A Yes.

10 Q Does the Internet Archive provide those  
11 statistics to the partners?

12 A We have usage statistics that show where  
13 geographically users are coming to when they visit  
14 the partner library's collection.

15 Q Tell me about those geographic statistics.

16 A So it's state- or country-level access.

17 Q It's not more granular than state or  
18 country?

19 A No.

20 Q So you wouldn't know whether someone was  
21 coming to check out the book -- in the state of  
22 New York, you would not know whether they were  
23 coming from New York City or coming from some  
24 small town in Upstate New York?

25 A Correct.

1 in the e-mail, Jeff Kaplan has responded back that  
2 all items and collections have been removed.

3 BY MS. McNAMARA:

4 Q And so you did nothing further to make  
5 sure that those titles remained off the system; is  
6 that right?

7 A Correct.

8 Q Okay. Turning back to the one-to-one  
9 ratio which, A, you've been designated; and, B, I  
10 think we've established is central to controlled  
11 digital lending.

12 Let me ask you, Mr. Freeland, it is true  
13 that under controlled digital lending a library  
14 may only lend a digital copy of a book if it has a  
15 corresponding physical copy of that book that is  
16 not simultaneously checked out; isn't that  
17 correct?

18 A Not exclusively. If the library has the  
19 permission of the rights holder, then the library  
20 doesn't have to have the physical copy.

21 Q Okay. Setting aside that the library has  
22 the permission of the rights holder, otherwise if  
23 it does not have permission of the rights holder,  
24 then central to the one-to-one concept is that a  
25 physical copy and a digital copy cannot be checked

1 out at the same time?

2 MR. GRATZ: Objection to form.

3 You can answer.

4 THE WITNESS: Correct.

5 BY MS. McNAMARA:

6 Q You said if -- if the partner library has  
7 the permission of the rights holder, tell me about  
8 that. Do some partner libraries have permissions  
9 of the rights holders?

10 MR. GRATZ: Objection, misstates the  
11 witness's previous testimony.

12 THE WITNESS: Not the library, the  
13 publisher.

14 BY MS. McNAMARA:

15 Q I see. We're talking here -- I'm now  
16 moving to partner libraries. I've changed  
17 direction. I apologize if that wasn't clear.

18 I'm not talking about the partner presses,  
19 the partner publishers.

20 I'm talking about partner libraries in the  
21 Open Libraries program.

22 A Can you restate the question?

23 Q Well, I didn't ask you a question yet. I  
24 was just -- I was just making it clear, because I  
25 think your answer to the last question assumed we



1       were talking about partner publishers.

2               I'm now talking about -- this line of  
3       questions I'm going to ask you from here on out  
4       are dealing with partner libraries in the  
5       Open Libraries program, okay?

6               A   Understood.

7               Q   And so I believe that it is -- as we've  
8       established, it's central to the controlled  
9       digital lending that a physical copy cannot be  
10      checked out at the same time as a digital copy,  
11      correct?

12              A   Correct.

13              Q   And so is there -- and I know I've  
14      talked -- I've asked you questions, and I'm not  
15      going to repeat them about what obligations, if  
16      any, Internet Archive places on partner libraries  
17      concerning how they maintain physical copies, but  
18      I don't believe I asked you whether Internet  
19      Archive has implemented any technology so that it  
20      is aware if a partner library checks out a book.

21              A   Is there a question?

22              Q   Yes. Does the Internet -- has the  
23      Internet Archive implemented any technology so  
24      that it is automatically aware that a partner  
25      library has checked out a book that is covered by

1 the one-to-one ratio?

2 A No.

3 Q And are you aware that some libraries in  
4 fact do not limit the circulation of the books  
5 that are available on Open Library?

6 A Not to my knowledge.

7 Q Let's look at what's been previously  
8 marked as Plaintiffs' Exhibit 261.

9 MR. MAZUREK: Put that up right now. That  
10 should be in your folders.

11 (Plaintiffs' Exhibit 261 is introduced for  
12 the record.)

13 BY MS. McNAMARA:

14 Q Mr. Freeland, this is what's been marked  
15 as Plaintiffs' Exhibit 261. It's an e-mail chain  
16 between you, a Kevin French, copying Lauri  
17 McIntosh dated August 26th and August 23, 2019.

18 A Yes, I have that.

19 Q Okay. First of all, who is Lauri  
20 McIntosh?

21 A Lauri McIntosh is a program director at  
22 Zepheira.

23 Q And we've previously identified that  
24 Zepheira has a relationship with Internet Archive;  
25 is that right?

1           A    There are a number of reference  
2   collections.   Some are on the floor, some are held  
3   behind a desk, some are in offsite storage.  
4   There's a variety of ways a collection can be a  
5   noncirculating reference collection.

6           Q    When the noncirculating reference  
7   collection is on the floor, could a visitor to the  
8   library look at the book?

9           MR. GRATZ:   Objection to form.

10          THE WITNESS:   Yes.

11   BY MS. McNAMARA:

12          Q    And they could take that book to a library  
13   table and read it for whatever period of time they  
14   stayed in the library; is that right?

15          A    Again, that would depend on local policies  
16   and procedures.

17          Q    I'm not asking about all libraries.   I'm  
18   asking about your time at the Washington Library  
19   where you said you had some noncirculating  
20   reference collections, that some were on the  
21   floor.

22                So if the books were on the floor, a  
23   patron of the library who was physically there  
24   could take that book off the shelf, bring it to a  
25   table and read it; isn't that right?

1           A    Yes.

2           Q    And if a partner library had a similar  
3   noncirculating reference collection, then a  
4   reader -- then a patron at that library could be  
5   reading the book at the same time that book was  
6   checked out from archive.org; isn't that right?

7           MR. GRATZ:  Objection to form.

8           THE WITNESS:  Possibly.  Again, it would  
9   depend on what does "circulating" mean in the  
10  local library's context.

11          BY MS. McNAMARA:

12          Q    But if they allow patrons -- if the book  
13   was on the shelf and the patrons would take a book  
14   off the shelf and go to a library table and start  
15   to read it, Internet Archive would have no way of  
16   knowing that was happening, would it?

17          MR. GRATZ:  Objection to form.

18          THE WITNESS:  Correct.

19          BY MS. McNAMARA:

20          Q    Now, going on in this e-mail,  
21   Mr. Freeland, you go on to write:

22                Other libraries are taking the approach  
23   that they don't need to suppress circulation  
24   because the likelihood is slim that all of our  
25   digital copies and all of the physical copies

1 Is that correct?

2 A Correct.

3 Q So you would have no -- not you, but  
4 Internet Archive would have no way of knowing  
5 whether a book had been checked -- whether a book  
6 was being read in a particular library at any  
7 given time; is that right?

8 A Correct.

9 Q And in effect, you would have no way of  
10 knowing whether the physical and digital copies of  
11 the book were in circulation simultaneously, do  
12 you?

13 MR. GRATZ: Objection to form.

14 THE WITNESS: I'm not clear on the  
15 question.

16 BY MS. McNAMARA:

17 Q Internet Archive would have no way to know  
18 whether the physical and digital copies of a book  
19 were in circulation simultaneously; isn't that  
20 right?

21 MR. GRATZ: Objection to form.

22 THE WITNESS: Correct.

23 BY MS. McNAMARA:

24 Q During the time that you've been director  
25 of Open Libraries, has Internet Archive taken any

1 action against a library that did not suppress  
2 circulation properly?

3 A No.

4 Q Are you familiar with the term "reserve  
5 shelves"? Does that mean something different than  
6 noncirculating reference collections?

7 MR. GRATZ: Objection, compound, form.

8 THE WITNESS: Yes, I'm familiar with  
9 course reserves.

10 BY MS. McNAMARA:

11 Q And -- well, I didn't say course reserves.

12 When I reference the term "reserve  
13 shelves," what does that mean to your mind?

14 A The term "reserve shelves" doesn't mean  
15 anything to me.

16 Q So the only way you understand that term  
17 is "course reserve shelves"?

18 A Yes.

19 Q Explain to me. What does course reserve  
20 shelves mean?

21 A Course reserves are in an academic library  
22 where a faculty member will select a book  
23 from -- to be used in a class and ask the library  
24 to hold that book out of circulation but on the --  
25 on the reserve -- the course reserves system and

1 A Complete an online form.

2 Q What's involved in that online form?

3 A Basic contact information including e-mail  
4 address.

5 Q Anything else?

6 A I'm not familiar with the form.

7 Q Are there any geographic limitations on  
8 signing up?

9 A No.

10 Q So someone could sign up from anywhere in  
11 the world?

12 A Yes.

13 Q So once a user is signed up for an  
14 archive.org account, do they need to do anything  
15 else in order to be able to borrow books from the  
16 lending library?

17 A No.

18 Q Now, when a book is checked out from the  
19 lending library, is there a default loan period?

20 MR. GRATZ: Objection to form.

21 THE WITNESS: Yes. Our default loans are  
22 one-hour loans.

23 BY MS. McNAMARA:

24 Q And they didn't always -- the default loan  
25 was not always one hour; isn't that right?

1 A Correct.

2 Q When was it changed to one hour?

3 A That change was made in June of 2020.

4 Q Why was it made?

5 A There were two primary reasons.

6 One was after observing how our users were  
7 interacting with our lending library and also  
8 following the lead of the HathiTrust Digital  
9 Library which implemented one-hour loans for their  
10 collection at about the same time.

11 Q Tell me about following how users use.

12 How did that inform the decision to change  
13 the default period to one hour?

14 A Engineers at the Internet Archive did a  
15 study to look at borrowing patterns for our  
16 collection and determined that the majority of our  
17 users were in and out of the book in less than an  
18 hour, in most cases less than 15 minutes.

19 Q Was the decision to move to default one  
20 hour informed in any way by the lawsuit that was  
21 filed in this action?

22 A No.

23 MR. GRATZ: Objection.

24 BY MS. McNAMARA:

25 Q Pardon me?



1 A No.

2 Q You're aware, are you not, that this  
3 action was commenced in approximately the  
4 beginning of June 2020?

5 A Yes.

6 Q And this change occurred in June 2020,  
7 shortly after the action was commenced; is that  
8 right?

9 A Yes.

10 Q Prior to the default, one-hour loan, what  
11 was the previously default?

12 A Fourteen days.

13 Q So back on the one-hour loan, when a user  
14 borrows a book for one hour, can it renew the loan  
15 after the hour has expired?

16 A Yes.

17 Q Is there any limit to the number of  
18 consecutive times a user can renew a one-hour  
19 loan?

20 A I don't know.

21 Q Are there any circumstances in which a  
22 user can borrow a book for more than one hour?

23 A Yes. If we have additional copies of --  
24 additional digital copies of the book, then those  
25 additional copies are available for a 14-day loan.

1       that correct?

2           A    Yes.

3           Q    Okay.  So if a user goes to archive.org,  
4       can they do a data search for, let's say the  
5       Gettysburg Address across the millions of books  
6       that are available on the platform?

7           A    Yes.

8           Q    And do you -- do you know how that works?

9           A    No.

10          Q    Do you have any information as to what  
11       percentage of users engage in data or text mining?

12          A    No.

13          Q    Do you have any knowledge as to whether  
14       it's more than 1 percent?

15          A    I don't know.

16          Q    Do you -- do you know whether Internet  
17       Archive has information as to what percentage of  
18       users engage in data or text mining?

19          A    I don't know.

20          Q    You were designated to testify on behalf  
21       of the Internet Archive concerning data and text  
22       mining.  So when you say you don't know, are you  
23       stating that no one at Internet Archive has  
24       information on the percentage of users who engage  
25       in text mining?

1 MR. GRATZ: Objection to form. And I  
2 think that misstates the topic a little bit.

3 But you can answer the question.

4 THE WITNESS: I know about specific data  
5 mining uses. I don't know about percentage and  
6 numbers across the Internet Archive user  
7 population.

8 BY MS. McNAMARA:

9 Q So my question, Mr. Freeland, is, do you  
10 know whether Internet Archive has data concerning  
11 the percentage of uses -- percentage of users who  
12 engage in text mining?

13 MR. GRATZ: Objection --

14 BY MS. McNAMARA:

15 Q Not whether you know it personally, but  
16 whether Internet Archive has that information.

17 MR. GRATZ: Objection, outside the scope  
18 of the noticed topics, form.

19 You can answer.

20 THE WITNESS: I don't know.

21 MS. McNAMARA: I'm reading into the  
22 record, so it's clear, the topic that was agreed  
23 that Mr. Freeland would be prepared to testify to,  
24 and it is as follows:

25 "The Internet Archive will designate Chris

1 Freeland to testify to users' reasons for  
2 borrowing books on Open Library, as well as the  
3 Internet Archive's contention that its lending  
4 library is used by data scientists to do  
5 computational analysis of texts."

6 BY MS. McNAMARA:

7 Q So with that preamble, Mr. Freeland, I ask  
8 the question again:

9 Do you have any information as to the  
10 percentage of users of the Internet Archive  
11 platform that engages in computation analysis of  
12 text?

13 MR. GRATZ: Objection, outside the scope  
14 of the noticed topics.

15 THE WITNESS: I know about individual  
16 research projects. I don't know about number or  
17 percent across the user population.

18 BY MS. McNAMARA:

19 Q Okay. Tell me about what you know about  
20 individual research projects.

21 A I know of a couple of -- I know of two  
22 data mining projects that come to mind.

23 The first is a project that I previously  
24 used to work on, the Biodiversity Heritage  
25 Library, which was analyzing the scientific texts

1 at the Internet Archive to extract out all of the  
2 scientific names published within books, so that  
3 scientists could have a names-based index to  
4 literature.

5 Q Okay. On that particular project that  
6 you've just identified, who was engaged in that,  
7 to your knowledge?

8 A So that was the member libraries of the  
9 Biodiversity Heritage Library for which I used to  
10 be the technical director.

11 Q And do you know how many members there  
12 are?

13 A Dozens. I don't know the exact number  
14 today.

15 Q It's under a hundred, though; is it not?

16 A I believe so, yes.

17 Q That was one example that you were aware  
18 of concerning a computation analysis of the text.

19 You said there was a second example you  
20 were aware of.

21 A Yes, we have a -- there was another user  
22 who was compiling an Isaac Asimov bibliography and  
23 was searching through relevant texts --  
24 searching -- trying to find occurrences of  
25 Asimov's name for his bibliography.

1 Q And was he successful in that endeavor, to  
2 your knowledge?

3 A Yes, we wrote a blog post about his  
4 research.

5 Q Are you aware of any other users other  
6 than the members of the Biodiversity Directive and  
7 its single user who was doing research on Isaac  
8 Asimov? Do you know of any other users of Open  
9 Library that have engaged in computational  
10 analysis of texts?

11 MR. GRATZ: Objection to form.

12 THE WITNESS: There are other users. I  
13 believe the academic who comes to mind, I believe  
14 her name is Laura Gibbs. She is also compiling  
15 a -- it's a bibli- --

16 BY MS. McNAMARA:

17 Q And how were you aware of Ms. Gibbs'  
18 compilation?

19 A Notices -- messages on Twitter for use of  
20 our collection.

21 Q Okay. So that's a third person. Do you  
22 know of any other --

23 MR. GRATZ: Objection to form.

24 THE WITNESS: Those are the ones that come  
25 to -- readily come to mind.

1 endorse; is that right?

2 A That's not accurate. MIT Press did  
3 endorse the statement.

4 MS. McNAMARA: Let's have marked as  
5 Plaintiffs' Exhibit 283, tab 188.

6 MR. MAZUREK: Get that up.

7 MS. McNAMARA: Actually, this is not the  
8 document I was looking for. So let's take that  
9 down. That is...

10 MR. MAZUREK: It has not been introduced,  
11 so we're good.

12 MS. McNAMARA: I'll have to find -- and I  
13 apologize for the confusion.

14 BY MS. McNAMARA:

15 Q Setting aside speaking to some of the  
16 library partners, did the Internet Archive receive  
17 any negative feedback on its implementation of the  
18 National Emergency Library?

19 A Yes.

20 Q Tell me about that.

21 A There were op-eds in the Washington Post  
22 and elsewhere about the National Emergency  
23 Library.

24 Q Other than the Washington Post and other  
25 op-eds, did the Internet Archive receive direct

1 communication from authors, publishers, groups,  
2 concerning the National Emergency Library?

3 A Yes.

4 Q Tell me about what you know about that.

5 A There were a number of people who objected  
6 to the National Emergency Library.

7 Q And what reasons, if any, were given as to  
8 why people objected to the National Emergency  
9 Library?

10 A There were a variety of reasons.

11 Q Tell me any reasons that you can recall?

12 A There were copyright concerns.

13 Q What copyright concerns were brought to  
14 the attention of Internet Archive concerning the  
15 National Emergency Library?

16 A Authors stating their concern about the  
17 copyright and the National Emergency Library.

18 Q Besides authors, did publishers express  
19 concern?

20 A Yes.

21 Q And were -- certain organizations  
22 expressed concerns, author or publisher  
23 organizations?

24 A Yes.

25 Q And were their concerns similar, that they



1 believed this was perhaps not followed -- was not  
2 consistent with copyright law, the National  
3 Emergency Library?

4 A Yes.

5 Q And so just so that it's clear what  
6 happened when Internet Archive implemented the  
7 National Emergency Library, it did away with wait  
8 lists; is that correct?

9 A Correct.

10 Q And it allowed -- and so it in effect did  
11 away with the one-to-one ratio; is that not right?

12 A Correct.

13 Q Are you aware whether there was any  
14 maximum number of concurrent users put into the  
15 system during the National Emergency Library?

16 A Yes.

17 Q And what was the maximum number that was  
18 put into the system that -- a book -- a number of  
19 people that could check out the same book?

20 A 10,000.

21 Q So do you know why the National Emergency  
22 Library was implemented?

23 A Yes.

24 Q Why?

25 A To respond to the total shutdown of the

1 educational and library systems in the United  
2 States and the world.

3 Q And it was intended to facilitate students  
4 and teachers and others to have access to books  
5 that they were otherwise shut out from; is that  
6 right?

7 A Correct.

8 Q Was the system designed in such a way that  
9 it was -- that users were limited to students or  
10 teachers?

11 A No.

12 Q So someone could just be, you know, in  
13 their home and wanting to read Huckleberry Finn or  
14 Catcher in the Rye and could check it out without  
15 a wait list; isn't that right?

16 A Yes.

17 Q And the National Emergency Library was in  
18 no way consistent with the principles of  
19 controlled digital lending, was it?

20 MR. GRATZ: Objection to form.

21 THE WITNESS: The National Emergency  
22 Library had all of the controls of controlled  
23 digital lending except the owned-to-loan ratio.

24 BY MS. McNAMARA:

25 Q And I believe we've previously established

1       that the owned-to-loan ratio was perhaps the most  
2       critical component to controlled digital lending;  
3       isn't that right?

4             A    Yes.

5             Q    Let me show you a document.  It may have  
6       been previously marked.

7             MS. McNAMARA:  So, Carl, correct me if  
8       I'm...

9             If it has, that -- that's at tab 82.

10            MR. MAZUREK:  One sec.  I don't believe  
11       it's previously been marked, so I can introduce  
12       it.

13            Should be in your folders as Exhibit 283.

14            (Plaintiffs' Exhibit 283 is introduced for  
15       the record.)

16       BY MS. McNAMARA:

17            Q    Mr. Freeland, this appears to be an e-mail  
18       dated March 24th, 2020, from Lila Bailey to CDL  
19       Policy.  Do you see that?

20            A    Yes.

21            Q    Do you have an understanding as to what  
22       the list of people is that -- is meant by CDL  
23       policy?

24            A    Generally.  I don't know all the list of  
25       the members.

1 Mr. Freeland, when you received this e-mail, not  
2 what Ms. Bailey intended by writing it.

3 I'm asking you as a recipient, how did you  
4 understand this?

5 A I don't recall.

6 Q As you sit here today, do you have an  
7 understanding as to the fact that access was not  
8 limited in the National Emergency Library to --  
9 only to people directly impacted by COVID-19?

10 MR. GRATZ: Objection to form.

11 THE WITNESS: There were no limitations to  
12 access to the National Emergency Library.

13 BY MS. McNAMARA:

14 Q So in order to access the National  
15 Emergency Library during its tenure, someone  
16 didn't need to certify that they were directly  
17 impacted by COVID-19, did they?

18 A No.

19 Q Ms. Bailey is also indicating that the  
20 reason she -- the Internet Archive is implementing  
21 this opt-out policy is to address authors who  
22 think that their sales might be impacted.

23 Do you see that?

24 A Yes.

25 Q Did you have an understanding that

1 digital lending?

2 MR. GRATZ: Objection to form. Also  
3 outside the scope of the noticed topics.

4 MS. McNAMARA: I don't agree with that,  
5 but --

6 MR. GRATZ: I'm happy to discuss it off  
7 the record. We've designated somebody else on  
8 takedowns.

9 MS. McNAMARA: This isn't takedown. This  
10 is controlled digital lending.

11 BY MS. McNAMARA:

12 Q Do you know, Mr. Freeland, whether if --  
13 when Internet Archive complied, if they did, with  
14 demands to take works out of the National  
15 Emergency Library, whether they also removed those  
16 works from Open Library?

17 MR. GRATZ: Same objection.

18 THE WITNESS: When books were taken out of  
19 the National Emergency Library, they were not  
20 taken out of controlled digital lending.

21 BY MS. McNAMARA:

22 Q Thank you.

23 And was that something made explicit, to  
24 your knowledge, to the people demanding that their  
25 books be removed?

1 with our publishing partners.

2 Q And you believe that was an error; is that  
3 right?

4 A Yes.

5 Q Do you know whether -- are you familiar  
6 with the organization Authors Alliance?

7 A Yes.

8 Q And Brewster Kahle is an adviser to the  
9 Authors Alliance; isn't that right?

10 A I don't know.

11 Q Do you -- are you aware that Pam Samuelson  
12 is on the board of the Authors Alliance?

13 A I don't know.

14 Q Do you know who Pam Samuelson is?

15 A Yes.

16 Q Who is she?

17 A She's a faculty member at UC Berkeley.

18 Q And to your knowledge, has the  
19 Authors Alliance often supported the Internet  
20 Archive?

21 A Generally, yes.

22 Q But it didn't support the National  
23 Emergency Library, did it?

24 A Not to my knowledge.

25 MS. McNAMARA: Let's have marked tab 211.

1 of that. So I apologize for that confusion. I  
2 don't know why the system -- they need different  
3 coding so that it goes in the right place.

4 So, Mr. Freeland, this is Plaintiffs'  
5 Exhibit 292, which appears to be a template form  
6 for a scanning agreement.

7 Have you seen this document before?

8 MR. GRATZ: I'm going to object while we  
9 are on the topic of making our record.

10 In our response to the 30(b)(6) topics, we  
11 said expressly that Internet Archive objects to  
12 the inclusion of digitization agreements that are  
13 unrelated to the Internet Archive's lending  
14 library as irrelevant as part of our objections  
15 and responses to this topic which were served on  
16 September 1, 2021, and so we don't regard this as  
17 being one of documents that is within the scope of  
18 what this witness is designated on. You are  
19 welcome to go ahead and ask questions about it and  
20 make whatever record you feel like you need to.

21 BY MS. McNAMARA:

22 Q Mr. Freeland, do you know -- you're aware,  
23 are you not, that Internet Archive has entered  
24 into scanning agreements with libraries to scan  
25 various books; is that correct?

1           A    Yes.

2           Q    And as a result of those scanning  
3   agreements, Internet Archive receives digital or  
4   creates digital copies of the works that are  
5   scanned; isn't that right?

6           A    Yes.

7           Q    And the digital copies that are obtained  
8   as a result of the scanning agreement, are those  
9   works included on archive.org?

10          MR. GRATZ:  Objection to form.

11          THE WITNESS:  Yes.

12   BY MS. McNAMARA:

13          Q    So if I'm understanding correctly, as a  
14   result of the scanning agreements that have been  
15   entered into by Internet Archive, the scanned  
16   digital works are amongst the holdings held by  
17   Internet Archive and counted in the overlap --  
18   not -- counted in the Open Libraries; is that  
19   right?

20          MR. GRATZ:  Objection to form.

21          THE WITNESS:  That is not accurate.

22   BY MS. McNAMARA:

23          Q    Explain to me how it's not accurate.

24          A    So our overlap only runs against the books  
25   that the Internet Archive has acquired and that we



1 digitized.

2 Q So the -- explain that to me, when you say  
3 "only against works that have been acquired."

4 A We only run our overlaps against the  
5 collection of books that the Internet Archive has  
6 acquired and digitized and make available through  
7 controlled digital lending.

8 Q And the digital copies of works that are  
9 created as a result of the -- as the scanning  
10 agreements entered into with libraries, do you not  
11 consider those acquired works?

12 MR. GRATZ: Objection, vague.

13 You can answer.

14 THE WITNESS: No, those books have not  
15 been acquired.

16 BY MS. McNAMARA:

17 Q So are any of those books included on  
18 archive.org for lending by users?

19 MR. GRATZ: Objection to form.

20 THE WITNESS: Can you -- can you clarify  
21 the question, please?

22 BY MS. McNAMARA:

23 Q Yes.

24 In the digital copies that are obtained by  
25 Internet Archive as a result of the scanning

1       agreements entered into by Internet Archive, are  
2       any of those scanned digital works included for  
3       lending on archive.org?

4           A   No, those books are not included in  
5       lending.

6           Q   What happens to those books, those digital  
7       copies?

8           A   Those books are available on archive.org,  
9       but they are not part of our lending system.

10          Q   So a user going to archive.org could not  
11       download or check out a book that had been  
12       obtained through a scanning agreement; is that  
13       right?

14           MR. GRATZ:   Objection to form.

15           THE WITNESS:   They could not check them  
16       out.

17       BY MS. McNAMARA:

18          Q   And what -- how is the system put in place  
19       so that there is a distinction between books  
20       obtained through scanning and books acquired for  
21       checking out? Mechanically, how is that  
22       established?

23          A   We have had a field in our metadata that's  
24       called the Internet Archive Boxid. I think its  
25       tag is IA Boxid. And that indicates that it is a

1 book that the Internet Archive owns in physical  
2 form, and then that book is made available in  
3 lending.

4 Q Thank you.

5 And if it doesn't have that IA Boxid, it  
6 cannot be lent to a user; is that right?

7 A Correct.

8 Q So is that a -- is that a condition of the  
9 process of the scanning agreement, that those  
10 books are never included in lending by the  
11 Internet Archive?

12 A I am not clear on the question.

13 Q And I don't think it was very clear, so  
14 I'm not surprised that you're not clear.

15 Is that a -- is that an express provision,  
16 to your knowledge, in the agreement reached with  
17 libraries that agree to scanning, that those  
18 scanned books will not be made available for  
19 lending?

20 A Yes.

21 Q Can users of Internet Archive, if they  
22 visit archive.org, look at the books or read the  
23 books but they can't check them out?

24 MR. GRATZ: Objection to form.

25 THE WITNESS: Yes.

1 BY MS. McNAMARA:

2 Q So the only distinction is that the books  
3 obtained -- the digital eBooks obtained as a  
4 result of the scanning agreement cannot be checked  
5 out, but they can be read by a user on Internet or  
6 archive.org; is that right?

7 MR. GRATZ: Objection, lacks foundation,  
8 vague in its use of the term "digital eBooks."  
9 Form.

10 You can answer.

11 THE WITNESS: So the only books that are  
12 available for checkout and borrowed through  
13 controlled digital lending are the books that the  
14 Internet Archive has acquired and digitized.

15 BY MS. McNAMARA:

16 Q But I guess I was asking a little  
17 different question.

18 I understand that they're not available  
19 for checkout or lending, but they are available to  
20 be read by visitors to archive.org; isn't that  
21 right?

22 MR. GRATZ: Objection, vague in its use of  
23 the term "they."

24 THE WITNESS: Yes.  
25

1 BY MS. McNAMARA:

2 Q And the practices you've just been  
3 describing, these are the current practices  
4 followed by Internet Archive?

5 A Yes.

6 Q Do you know whether Internet Archive has  
7 always made the distinction that you've described  
8 that books are not available for lending if they  
9 were simply obtained through the -- through  
10 scanning agreements?

11 MR. GRATZ: Objection, vague in its use of  
12 the word "obtained," lacks foundation.

13 You can answer.

14 THE WITNESS: I don't know.

15 BY MS. McNAMARA:

16 Q So during the time that you've been  
17 employed by Internet Archive, have you ever been  
18 aware of books that were digital copies that were  
19 obtained as a result of a scanning agreement?  
20 Have you ever been aware whether those books were  
21 able to be checked out on archive.org?

22 A I'm not sure.

23 MR. GRATZ: Objection, vague as to time,  
24 form.

25 THE WITNESS: I'm not sure.

1 BY MS. McNAMARA:

2 Q You're not.

3 If you would direct your attention to this  
4 agreement that has been marked as Exhibit 292,  
5 this form agreement?

6 A Yes.

7 Q Under Services, if you look at the second  
8 paragraph under Services, the last sentence, it  
9 reads:

10 Internet Archive will provide one digital  
11 copy of each digitized item (a "Digital Copy") to  
12 the library and will retain additional digital  
13 copies.

14 Do you see that?

15 A Yes.

16 Q Do you know what Internet Archive does  
17 with the retained additional copies?

18 MR. GRATZ: Objection to form.

19 THE WITNESS: I don't know.

20 BY MS. McNAMARA:

21 Q One copy is presumably posted on  
22 archive.org; is that right?

23 MR. GRATZ: Objection to form.

24 THE WITNESS: Yes.

25

1 BY MS. McNAMARA:

2 Q And it goes on the -- two sentences later,  
3 it says:

4 The digital copies will be freely  
5 accessible and downloadable from Internet Archive  
6 via HTTP, Torrent or a similar method.

7 Do you see that?

8 A Yes.

9 Q What do you understand the use of  
10 "downloadable" in that sentence to mean if, as  
11 you've testified, these works are not available  
12 for lending?

13 A So our partner libraries are scanning  
14 materials that are in the public domain. So they  
15 are not available for lending, and they're made  
16 available for download.

17 Q So is it your understanding that the  
18 scanning agreements only apply to public domain  
19 material?

20 MR. GRATZ: Objection, vague.

21 THE WITNESS: No.

22 BY MS. McNAMARA:

23 Q So if the scanned digital copies were  
24 works that were not in the public domain per this  
25 agreement, would those copies be accessible and

1 downloadable from the Internet Archive?

2 MR. GRATZ: Objection to form.

3 THE WITNESS: No.

4 BY MS. McNAMARA:

5 Q And how do you know that?

6 A Because books that are in copyright are  
7 only made available through controlled digital  
8 lending, and those are only books that the  
9 Internet Archive owns and is digitized.

10 Q Thank you. Let me see.

11 MS. McNAMARA: Can we put in, if it hasn't  
12 been marked before, tab 33, please.

13 MR. MAZUREK: Should be in your folders as  
14 Exhibit 293.

15 (Plaintiffs' Exhibit 293 is introduced for  
16 the record.)

17 BY MS. McNAMARA:

18 Q Mr. Freeland, this is an e-mail from  
19 Brewster Kahle to Robert Newland dated  
20 November 24, 2016, and I appreciate that this  
21 predates your time with the Internet Archive, but  
22 I'm -- given your experience and knowledge, I was  
23 wondering if you could help me to understand what  
24 is being said here. At the beginning Mr. Kahle is  
25 saying:



1 MR. GRATZ: And, Liz, you can keep going.  
2 I'm not stopping you. But I do want to note that  
3 we're past 7 hours.

4 MS. McNAMARA: Oh, we are? I apologize.  
5 I didn't think we were.

6 Well, I'm almost done. I thought I had  
7 plenty of time. But anyway, thank you, Joe. I am  
8 really almost done. I appreciate your courtesy.

9 MR. MAZUREK: I'm introducing this as  
10 Exhibit 295, and it will -- should be in your  
11 folders now.

12 (Plaintiffs' Exhibit 295 is introduced for  
13 the record.)

14 BY MS. McNAMARA:

15 Q Mr. Freeland, do you see what's been  
16 marked as Plaintiffs' Exhibit 295, which is a  
17 listing of a book that's available for checkout on  
18 Open Libraries today? And the book is called The  
19 Passmores in America: A Quaker family through six  
20 generations.

21 Do you see that?

22 A Yes.

23 Q And the publication date is 1992.

24 Do you see that?

25 A Yes.

1           Q   You wouldn't expect this book to be in the  
2   public domain, would you?

3           MR. GRATZ:  Objection, calls for a legal  
4   conclusion, lacks foundation.

5           You can answer.

6           THE WITNESS:  I don't know.

7   BY MS. McNAMARA:

8           Q   Do you see for this book the digitizing  
9   sponsor was Boston Public Library and the  
10   contributor was the Boston Public Library?

11          A   Yes.

12          Q   And do you see that the publisher is  
13   Lewiston, New York, E. Mellen Press?

14          MR. GRATZ:  Objection to form.

15          THE WITNESS:  Yes.

16   BY MS. McNAMARA:

17          Q   Does this appear to be another book that  
18   is available for lending on the Internet Archive  
19   that was scanned -- that was obtained -- the  
20   digital copy was obtained by scanning?

21          MR. GRATZ:  Objection to form.

22          THE WITNESS:  Yes.

23   BY MS. McNAMARA:

24          Q   So does this help you reconsider whether  
25   it is in fact true that books that are obtained by

1 the Internet Archive via a scanning agreement are  
2 never included in digital lending?

3 MR. GRATZ: Objection, vague in its use of  
4 the term "scanning agreement." Objection to form.

5 You can answer.

6 THE WITNESS: I'm not clear on the  
7 question.

8 BY MS. McNAMARA:

9 Q Let me rephrase it.

10 Does this help you to realize that books  
11 may well be available for lending on archive.org  
12 that were obtained via scanning agreement versus  
13 owned by Internet Archive?

14 MR. GRATZ: Objection to form, vague in  
15 its use of the term "scanning agreements."

16 THE WITNESS: Yes.

17 MS. McNAMARA: Okay. Thank you very much.  
18 I very much appreciate your time today and you  
19 answering all these questions.

20 And, Joe, I appreciate you allowing me to  
21 inadvertently go over seven hours.

22 So I wish everybody a great weekend and  
23 wonderful holidays, and we will be back in touch.  
24 But thank you very much, Mr. Freeland.

25 MR. GRATZ: Very good. I just have a few

## 1 CERTIFICATE OF COURT REPORTER - NOTARY PUBLIC

2 I, Cynthia J. Conforti, Certified  
3 Shorthand Reporter No. 084-003064, CSR, CRR, and a  
4 Notary Public in and for the County of Cook, State  
5 of Illinois, the officer before whom the  
6 foregoing deposition was taken, do hereby certify  
7 that the foregoing transcript is a true and  
8 correct record of the testimony given; that said  
9 testimony was taken by me stenographically and  
10 thereafter reduced to typewriting under my  
11 direction; that reading and signing was requested;  
12 and that I am neither counsel for, related to, nor  
13 employed by any of the parties to this case and  
14 have no interest, financial or otherwise, in its  
15 outcome.

16 IN WITNESS WHEREOF, I have hereunto set my  
17 hand and affixed my notarial seal this 4th day of  
18 January, 2022.

19 

20  
21 My commission expires: October 30, 2023  
22  
23

24 Notary Public in and for the  
25 State of Illinois